IN THE HIGH COURT OF BOMBAY AT GOA

TAX APPEAL NO. 60 OF 2002

The Commissioner of Income Tax
Having office at Aayakar Bhavan,
Patto Plaza, Panaji, Goa. ... Appellant

versus

1. Mrs. Sarita P. Shirke
   Chowgule House,
   Mormugao Harbour.

2. The Income Tax Appellate Tribunal
   Panaji Bench, Aayakar Bhavan,
   Patto Plaza, Panaji-Goa. ... Respondents

Mr. S. R. Rivonkar, Advocate for the Appellant.

Mr. R. Srinivasan with Mr. Sudin Usgaonkar, Advocates for Respondent No.1.

CORAM : S. S. PARKAR &
V. M. KANADE, JJ.

DATE : 2ND AUGUST,2005.

ORAL JUDGMENT(PER V. M. KANADE, J.)

The Revenue is challenging the Judgment and Order

passed by the Income Tax Appellate Tribunal which has confirmed the Order passed by the Deputy Commissioner of Income Tax(Appeals) and has held that Respondent No.1 was not liable to pay Gif-Tax and her case was exempted under Section 5(1)(ii). The Appeal was admitted by this Court and the following substantial question of law was framed:-

> "A. Whether the gifts made in Kashmir by the Assessee a Non-Resident of India, out of the money transferred from other part of the country, is exempted from tax under the Gift Tax Act, 1957?"

2. The brief facts which are necessary for deciding this Appeal are as under:-

It is the case of the Revenue that one Ashok Chowgule deposited an amount of Rs.7,85,631/- in Central Bank, Vasco on 21-10-1982. Before the said amount was deposited in August, 1981, 20 Companies of Chowgule House were floated at Kashmir. Thereafter on 25-10-1982 a Demand Draft of Rs.7,90,000/- was issued by State Bank of India, Vasco in Assessee's name and it was made payable in SBI Bank, Kashmir. On 30-10-1982 a Savings Bank Account was opened at State Bank

of India, Kashmir. Thereafter, on 1-11-1982 the Assessee arrived in India and on the next day i.e. on 2-11-1982 the Assessee gave gifts of Rs.1,58,000/- to 5 trusts of Chowgule family in Kashmir in favour of the children of Vijay and Ashok Chowgule. Thereafter on 2-12-1982, the Assessee sold her 12,340 equity shares to 3 Companies in Kashmir at the rate of Rs.65/- per share aggregating to Rs.8,02,100/- by an agreement which was executed at Kashmir. The 3 Companies received loan from the 5 trusts of Rs.7,85,631/-. Thereafter, on 20-12-1982 by Demand Draft of Rs.8,00,000/- was transferred from Kashmir to Central Bank, Vasco and this amount was withdrawn and advanced to M/s. Chowgule Brothers. Thereafter on 27-4-1983 the Assessee received an amount of Rs.8,00,000/- from M/s. Chowgule Brothers and on 29-4-1983 this amount was invested in Rural Development Bonds and thereafter exemption was claimed in the return of income for the assessment year 1983-84.

3. The learned Counsel appearing on behalf of the Appellant submitted that the aforesaid transaction of gift was a colourable transaction which had been resorted to solely for the purpose of avoiding tax. He submitted that it was open for the Court to gather from the circumstances the real nature of the transaction and to draw inference whether the said transaction was made with an intention to escape tax liability. He relied on

a Judgment of the Supreme Court in the case of **McDowell And Co. Limited** v. **Commercial Tax Office** reported in 154 ITR 148. He invited our attention to the observation made by Justice Chinnappa Reddy J who had given a separate concurring Judgment and submitted that in view of the aforesaid observation it was the duty of the Court to examine whether a legal device had been used to avoid tax. He submitted that both the lower authorities had not taken into consideration the ratio of the said Judgment and had not examined whether the transaction was in fact a colourable device to escape tax liability. He submitted that in the present case Respondent No.1 though is admittedly a Non-Resident Indian she was also not residing in Kashmir and had no business or interest whatsoever in Kashmir and on the contrary had interest only in Goa. The Respondent No.1 had made a gift by issuing a cheque on State Bank of India, Srinagar and this amount was transferred from Bank balance from Vasco to Kashmir. He, therefore, submitted that this was clearly a colourable transaction for avoiding the Gift-Tax.

4. Mr. R. Srinivasan, the learned Counsel appearing on behalf of Respondent No.1 submitted that the question of law which was framed was not a substantial question of law. He submitted that whether a transaction amounts to a colourable device or not is a question of fact and since there was a concurrent finding given by the two lower authorities it was not open for the High Court to interfere with the concurrent finding of fact while exercising its jurisdiction under Section 260A of the Income Tax Act. He relied on 3 Judgments of the Supreme Court in support of the said submission. He further submitted that the Judgment in the case of **McDowell And Co. Limited** v. **Commercial Tax Office**(supra) had been overruled by the Supreme Court in the case of **Union of India and another** v. **Azadi Bachao Andolan and another** reported in Income Tax Reports Vol.263 page 706. He also submitted that this case was also further directly covered by the Judgment of the Gujarat High Court in the case of **Commissioner of Gift-Tax** v. **Dipak A. Sheth** reported in Income Tax Reports Vol.254 page 236. He also relied on a Judgment of the Delhi High Court in the case of **Commissioner of Income-Tax** v. **Antartica Investement Pvt. Ltd**. reported in Income Tax Reports Vol.262 page 494.

5. In our view, it is not possible to accept the submission made by the learned Counsel appearing on behalf of the Appellant. Section 5(ii) reads as under:-

> "**S. 5. Exemption in respect of certain gifts**.--(I) Gift-tax shall not be charged under this Act in respect of gifts made by any person--
>
> (i) of immovable property situate outside the territories to which this Act extends;
>
> (ii) of movable property situate outside the said territories unless the person--
>
> (a) being an individual, is a citizen of India and is ordinarily resident in the said territories, or
>
> (b) not being an individual, is resident in the said territories, during the previous year in which the gift is made".

6. The Section clearly contemplates grant of exemption to individuals who are not ordinarily residing in India and secondly where movable property is given by way of gift outside the territory in India. A gift, therefore, which is made in Kashmir would therefore fall outside the purview of Section 3 of the Gif-Tax Act as it is specifically exempted by Section 5(ii).

7. In the present case, it is an admitted position that Respondent No.1 is a Non-Resident Indian who is permanently residing in Dubai. The Respondent No.1 arrived in India on 1-11-1982 and on 2-11-1982 a gift of Rs. 7,85,631/- at the rate of Rs. 1,58,000/- was given to 5 Trusts in Kashmir. On the same day, Respondent No.1 sold her 12,340 squity shares to the 3 Companies in Kashmir by agreement executed at Kashmir at the rate of Rs.65/- per share aggregating to Rs.8,02,100/-. It is alleged by the Revenue that this was only a device to evade the tax which would have ordinarily arisen if the gift had been made in Goa or at any other place in India. The learned Counsel submitted that this Court was competent to lift the corporate veil and to examine whether the transaction or the device is to evade tax. In our view, it cannot be said that the said transaction is a colourable device for the purpose of avoiding

Gift-Tax. A concurrent finding has been recorded by both the lower authorites that the amount lying in the account of Respondent No.1/Assessee in Vasco was transferred by demand draft to her account in Kashmir and there she had made a gift to 5 Trusts in Kashmir. The Respondent No.1 being a Non-Resident of India and permanently residing in Dubai would have very well given the gift in Dubai where the gift is not taxable. It is, therefore, not possible to come to a conclusion that this was a colourable device for avoiding tax. In any case, even otherwise, if a person is entitled to an exemption in law and accordingly makes a plan to avoid the tax liability which is otherwise legally entitled to it would not amount to a tax evasion. The Supreme Court in a recent case in the case of **Union of India and another** v. **Azadi Bachao Andolan and another** (supra) has to a very large extent watered down the ratio laid down in **McDowell And Co. Limited** v. **Commercial Tax Office(supra)** and has observed that the observations made by Chinnappa Reddy, J. in the said Judgment do not necessarily reflect the observations of the other Hon'ble Judges. The Supreme Court in this Judgment has considered the majority view and the view taken by Chinnappa Reddy, J. and has observed that the majority Judgment in **McDowell And Co, Limited** v. **Commercial Tax Office**(supra) had not endorsed the view of Chinnappa Reddy, J. The Apex Court has observed as

under:-

> "As we shall show presently, far from being exorcised in its country of origin, Duke of Westminster's case [1936] AC 1 (HL); 19 TC 490 continues to be alive and kicking in England Interestingly, even in McDowell's case[1985] 154 ITR 148 (SC), though Chinnappa Reddy J. dismissed the observation of J. C. Shah J. in CIT v. A. Raman and Company[1968] 67 ITR 11 (SC) based on Westminster's case [1936] AC 1 (HL); 19 TC 490 [68] and Fisher's Executors case [1926] AC 395 at 412 (HL), by saying (page 160 of [1985] 154 ITR) "we think that the time has come for us to depart from the Westminster principle as emphatically as the British courts have done and to dissociate ourselves from the observations of Shah J., and similar observations made elsewhere", it does not appear that the rest of the learned Judges of the Constitutional Bench contributed to this radical thinking. Speaking for the majority, Ranganath Mishra J.(as he then was) says in McDowell's case [1985] 154 ITR 148, 171 (SC):
>
> "Tax planning may be legitimate provided it is within the framework of law. Colourable devices cannot be part of tax planning and it is wrong to encourage or entertain the belief that it is honourable to avoid the payment of tax by resorting to dubious methods. It is the obligation of every citizen to pay the taxes

> honestly without resorting to subterfuges."(emphasis supplied)
>
> This opinion of the majority is a far cry from the view of Chinnappa Reddy J.(page 160) : "In our view the proper way to construe a taxing statute, while considering a device to avoid tax, is not to ask whether a provision should be construed literally or liberally nor whether the transaction is not unreal and not prohibited by the statute, but whether the transaction is a device to avoid tax, and whether the transaction is such that the judicial process may accord its approval to it." We are afraid that we are unable to read or comprehend the majority judgment in McDowell's case[1985] 154 ITR 148 (SC) as having endorsed this extreme view of Chinnappa Reddy J., which, in our considered opinion, actually militates against the observations of the majority of the judges which we have just extracted from the leading judgment of Ranganath Mishra J.(as he then was)."

8. The Supreme Court, therefore, by the said Judgment has clearly watered down the view taken by Chinnappa Reddy J. in **McDowell And Co. Limited** v. **Commercial Tax Office**(supra). The submission of the learned Counsel appearing on behalf of the Revenue that the ratio of **McDowell And Co. Limited** v. **Commercial Tax Office**(supra) is applicable to the facts of the present case therefore cannot be accepted.

9. The Calcutta High Court in the case of **Sheila Devi Chamria**

v. **Tar Chand Saraogi and others** reported in Income Tax Reports Vol.163 page 406 has held that the gift of shares is complete as soon as the shares are handed over to the donee along with blank transfer form duly signed by the donor. In the present case, the shares of Respondent No.1 were transferred by her to 3 Companies in Kashmir. A share is a movable property and, therefore, would also be covered under the provision of Section 5(1)(ii). The Respondent No.1 having transferred the shares in Kashmir would also be squarely covered within the exemption granted by Section 5(1)(ii) of the Gift-Tax Act. The gift of shares was made pursuant to an agreement executed at Kashmir whereby the Assessee/Respondent No.1 herein sold her 12,340 equity shares to the 3 Companies in Kashmir. Both the lower authorities in our view, have not committed any error in coming to the conclusion that both the transactions were exempted under the provisions of the Gift-Tax Act. We do not see any reason to interfere with the concurrent findings of fact recorded by both the lower authorities. The Appeal is accordingly dismissed.

S. S. PARKAR, J.

V. M. KANADE, J.

RD.